



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

EMERGENT RELIEF

OAL DKT. NO. EDS 09330-21

AGENCY DKT. NO. 2022-33564

D.I. ON BEHALF OF C.S.,

Petitioner,

v.

EDISON TOWNSHIP

BOARD OF EDUCATION,

Respondents.

D.I., on behalf of C.S, petitioner, pro se

R. Scott Eveland, Esq., for respondent (Inglesino, Webster, Wyciskala & Taylor,
LLC, attorneys)

BEFORE **TAMA B. HUGHES**, ALJ:

Record Closed: November 16, 2021

Decided: November 18, 2021

STATEMENT OF THE CASE

D.I. (petitioner) brings an action for emergent relief against the Edison Township Board of Education (respondent) seeking an order requiring the respondent to provide her daughter, C.S., a student eligible for special education, with home instruction pending the outcome of the due process hearing.

PROCEDURAL HISTORY

The matter was received by the Office of Special Education Programs (OSEP) on November 10, 2021, and thereafter transmitted to the Office of Administrative Law (OAL) as a contested case and scheduled for oral argument on November 16, 2021, at 9:30 a.m. Due to the Covid-19 pandemic, all in-person hearings at the OAL have been suspended with all hearings taking place remotely—via Zoom.

BACKGROUND

C.S. is fourteen years old and is currently a ninth grade student at Edison High School. She is eligible for Special Education and Related Services under the classification of auditorily impaired. The last Individualized Education Program (IEP) was put in place on February 9, 2021, with an effective date of September 1, 2021. Among other services, the IEP places C.S. in a self-contained special classroom for Mild/Moderate Learning or Language Disabilities. (Respondent's Brief, Melissa Wertz Certification (Wertz Certification, Exhibit A))

On September 28, 2021, C.S. was suspended from school for ten days for fighting. The suspension ran from September 28, 2021, to October 12, 2021. (Wertz Certification, Exhibit C) On October 13, 2021, upon notice to petitioner, the school held a "re-admit" meeting. (Wertz Certification, Exhibit C) Petitioner did not bring C.S. to the meeting—the reason cited was that she (petitioner) did not want C.S. to return to school for safety reasons. Since October 13, 2021, C.S. has not attended school with each day missed marked as "unexcused." (Wertz Certification, Exhibit B)

LEGAL ANALYSIS AND CONCLUSION

N.J.A.C. 6A:14-2.7(r) provides in pertinent part that a party may apply in writing for a temporary order of emergent relief as part of a request for a due process hearing under very limited circumstance.

1. Emergent relief shall only be requested for the following issues:

- i. Issues involving a break in the delivery of services;
- ii. Issues involving disciplinary action, including manifestation determinations and determinations of interim alternate educational settings;
- iii. Issues concerning placement pending the outcome of due process proceedings;
- iv. Issues involving graduation and participation in graduation ceremonies.

In filing the instant application, petitioner claimed that emergent relief was necessary pursuant to N.J.A.C. 6A:14-2.7(r)(i), (i) and (iii).

In support of her application, petitioner asserts that her daughter has been the target of bullying since the beginning of the school year and, previous to that, when she was in middle school. On September 28, 2021, C.S. was assaulted by one of the students that had been bullying her. She feels that the school failed to conduct a proper HIB investigation and she has significant concern for her daughter's physical and emotional wellbeing. Therefore, her daughter has not returned to school, however she needs home instruction so that she does not fall behind in her work.

According to the petitioner, she has not yet provided a medical note for her daughter to be excused from attending classes but did sign a consent for the school to speak to her daughter's counselor. Additionally, at the meeting on October 13, 2021, and subsequently in a follow-up email, she expressed her desire to have C.S. transferred to another school, not because of academic concerns, rather for her daughter's physical and mental well being.

Respondent argues that petitioner's underlying claim is, in actuality, a claim that the District has failed to comply with the requirements of New Jersey's Anti Bullying Law, N.J.A.C. 18A:37-13 et seq., its related regulations, N.J.A.C. 6A:16-7.7, and the

District's own HIB Policies and Procedures. Respondent asserts that such claims have their own administrative procedures and appeals process—none of which involve the filing of a due process petition with OSEP. As such, petitioner has failed to exhaust the administrative remedies under HIB. Garrow v. Elizabeth General Hospital and Dispensary, 79 N.J. 549, 558-559 (1979)

Respondent is correct. On September 28, 2021, C.S. was suspended for ten days from school for fighting. The suspension ended on October 12, 2021, and C.S. was required to return to school on October 13, 2021. C.S. has yet to return to school and petitioner has yet to provide any documentation on her daughter's behalf that would excuse her daughter's absence. While petitioner asserts that the school failed to conduct a proper HIB investigation and that she has concern for her daughter's safety and emotional well being—the sole reason why C.S. has not returned to school, the relief sought by petitioner is not related to C.S.'s disability or her rights under the IDEA and therefore does not meet the threshold set forth under N.J.A.C. 6A:14-2.7(r)(1).

Even assuming arguendo that petitioner met the initial burden in establishing a basis for emergent relief as set forth under N.J.A.C. 6A:14-2.7(r)(1), she cannot meet the standards set forth N.J.A.C. 6A:14-2.7(s). See Crowe v. DeGioria, 90 N.J. 126, 132-32 (1982)

N.J.A.C. 6A:14-2.7 (Due Process Hearings) states in relevant part:

(s) Prior to transmittal of a request for a due process hearing or an expedited hearing to the Office of Administrative Law, an application for emergent relief shall be made to the Director of the Office. After transmittal of a request for a due process hearing or an expedited hearing, any application for emergent relief shall be made directly to the Office of Administrative Law.

1. Emergent relief may be requested according to N.J.A.C. 1:6A-12.1. Emergent relief may be granted if the administrative law judge determines from the proofs that:
 - i. The petitioner will suffer irreparable harm if the requested relief is not granted;

- ii. The legal right underlying the petitioner's claim is settled;
- iii. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
- iv. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

The moving party has the burden of satisfying each of the Crowe factors by clear and convincing evidence. Id. at 132–134; Garden State Equal. v. Dow, 216 N.J. 314, 320 (2013)

Here, petitioner cannot establish irreparable harm. When questioned what irreparable harm would occur were the relief not granted, petitioner could not articulate any specific immediate harm—academically or otherwise. While a parent's concern over their child's physical and emotional well-being is not to be minimized, petitioner's concern for her daughter was looking towards the future and not immediate.

Even if C.S.'s absence from school is determined to be a "break in services," which can be deemed as irreparable harm, the disruption is a direct result of petitioner's actions in not sending C.S. back to school. See Hamilton Twp. Board of Education v. L.E. and A.E. o/b/o J.E., EDS 14744-18, Final Decision on Emergent Relief (October 22, 2018). It is harm that, as the respondent has succinctly pointed out, is "self inflicted." Petitioner cannot claim irreparable harm and seek specific relief when she herself has caused the harm and is in complete control of the cure.

In review of the second and third prong under Crowe, as with the first prong, petitioner is unable to meet her burden. First, as set forth more fully above, the underlying due process petition is truly a HIB claim and is not related to C.S.'s disability or her rights under the IDEA. Therefore, the underlying claim has been brought in the wrong forum.

Even if the petition was properly venued, petitioner does not have the right to temporarily change the placement of C.S., which is effectively what she has unilaterally

done by seeking home schooling for her child pending the outcome of the petition. While C.S. was suspended for ten days, such suspension did not rise to the level of a change in placement. N.J.A.C. 6A:14-2.8(c) Additionally, the respondent has to prove that it has offered FAPE to C.S. and it is only after it is determined that FAPE has not been provided following a due process hearing, would the appropriateness of a change in placement be considered.

In review of the fourth prong under Crowe—balancing of the equities—it is clear that the respondent would suffer greater harm than the petitioner if the relief requested—home schooling—is granted. Petitioner seeks an out-of-district placement on a HIB claim. In pursuit of that goal, she has unilaterally removed C.S. from the last agreed-upon placement under the February 2021 IEP, and now seeks to have the District pay for services that C.S. would have otherwise received had she returned to school on October 13, 2021. Any hardships that petitioner has had to date have been of her own making. To require the District to provide home schooling pending the outcome of the underlying petition would place a significant burden on the District in both costs and allocation of resources, and prevent the District from providing C.S. with a FAPE in the least restrictive environment.

With the above in mind, I **CONCLUDE** that petitioner did not satisfy all four requirements for emergent relief and that petitioner's request for emergent relief should be **DENIED**.

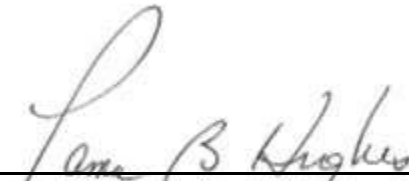
ORDER

For the foregoing reasons set forth above, it is hereby **ORDERED** that petitioner's request for emergent relief in the form of an order enjoining the District from issuing any further suspensions is **DENIED**.

This decision on application for emergency relief shall remain in effect until the issuance of the decision on the merits in this matter. The hearing having been requested by the parents, this matter is hereby returned to the Department of Education for a local resolution session, pursuant to 20 U.S.C.A. § 1415 (f)(1)(B)(i). If the parent or adult student feels that this decision is not being fully implemented with respect to program or services, this concern should be communicated in writing to the Director, Office of Special Education Policy and Dispute Resolution.

November 18, 2021

DATE


TAMA B. HUGHES, ALJ

Date Received at Agency

November 18, 2021

Date Mailed to Parties:

November 18, 2021

/dw

APPENDIX

EXHIBITS

For petitioner:

Request for Emergent Relief

For respondent:

Brief